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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SANTAWN ATUANYA MILLER, Defendant and Appellant.	B165190 (Los Angeles County Super. Ct. No. NA049632)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed.

David L. Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Santawn Atuanya Miller of one count of murder in violation of Penal Code[1] section 187, subdivision (a) (count 1) and three counts of attempted murder in violation of sections 664 and 187 subdivision (a) (counts 2 through 4). The jury found true the allegations as to all counts that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). Appellant admitted a prior serious felony conviction within the meaning of the three strikes law and two prior prison terms. (§§ 667, subd. (a)(1), & subds. (b)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d).)

On count 1, the trial court sentenced appellant to 25 years to life in state prison, doubled to 50 years due to the strike conviction, and one year for the firearm enhancement. The court sentenced appellant to life with the possibility of parole in counts 2, 3, and 4 and imposed a consecutive five-year term for the enhancement based on the prior serious felony conviction.

FACTS

On July 21, 2001, at approximately 11:45 p.m., Juan Carlos Espinoza was shot twice outside his residence at 1615 Rose Avenue in Long Beach. He was standing with a group of five persons that included his friends and family members. They were all attending a baptism celebration that had been going on since the afternoon and at which Latin music was playing very loudly. Juan Carlos[2] saw that his shooter was a Black man who had come from the passenger side of a blue car that stopped in the street. The man came up behind Juan Carlos, and when Juan Carlos turned around, the man pointed a semiautomatic gun at Juan Carlos's face. Juan Carlos was shot in the chin, and as he ran away he was hit in the right shoulder. The rest of the group ran away as well.

Francisco Javier Espinoza, the cousin of Juan Carlos, was also standing with the group. He saw the blue or black car drive by and then back up. The passenger got out,

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1 All further references to statutes are to the Penal Code unless stated otherwise.

2 We refer to the members of the Espinoza family by their first names to avoid confusion.

came up to them, and began shooting. Francisco heard three or four shots. The shooter was Black, and the driver of the car was also a Black male. The shooter was wearing a very long black T-shirt. Francisco and his cousin ran to the laundry room. Bullets struck Francisco in the hand, arm, and buttocks.

Juan Espinoza was one of the group chatting outside on Rose Avenue and is Juan Carlos Espinoza's uncle. When the shooting began, he ran, but he managed to see that the shooter was of the Black race. Juan hid behind a fence and was not hit by any bullets. He heard approximately four shots.

Neither Francisco nor Juan had a butterfly[3] tattoo on the neck, face, or head. Juan Carlos had no tattoo visible on his neck or above at the time of the shooting. Juan Carlos did not make any threats to any African-American driving by on the day of the shooting. Francisco had not made any threatening remarks to any African-Americans in the neighborhood and did nothing to provoke the shooting. There were no African-Americans at the party.

Jesus Miro Bicuna, for whose grandson the party was held, was shot and killed that night. He died as a result of a gunshot wound to the head. At appellant's trial, Bicuna's 13-year-old daughter, Fidela Acevedo, testified. She and her family were leaving the party and going to the gate when Acevedo heard shots. Her father was behind her. Acevedo turned to run and was hit in her right leg with a bullet.

Guillermo Cruz lived in a ground-floor apartment across the street from 1615 Rose Avenue. He could see the group of Hispanic people chatting through his metal security door as he watched television. He saw a car pull up, stop, and park. He saw a Black male wearing dark clothes and a baseball cap get out of the car, pull out a gun, and chamber a round. The gun was very big. The man then went slowly around the back of the car and approached the Hispanic men standing there. When the man fired the first

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[3] The prosecutor asked the witnesses if they had butterfly tattoos, presumably referring to the shooter's statement in which he said he shot specifically at someone with a bumblebee tattoo he recognized.

shot, Cruz saw a very big flame. Cruz heard four shots as the shooter followed the fleeing men. He saw the shooter walk back to the car, open the door, and get in. The car drove off at a normal speed in the direction of Pacific Coast Highway. Cruz and his wife called 911 and their taped conversation was played for the jury.

Officer Robert Bernsen of the Long Beach Police Department was in his police vehicle when he received a call informing him that a shooting had occurred, and the male Black suspects had just left in a light blue Buick Regal. Approximately two minutes after receiving the call, as he and his training officer drove eastbound on Pacific Coast Highway, they saw two Black males in a light blue Buick Regal-type vehicle. The officers turned off their lights and siren, made a U-turn and proceeded to follow the blue car as they requested assistance. The car's occupants were looking in the rearview mirrors at the police. The officers checked the blue car's registration and found it was registered to appellant. Two other police cars joined Bernsen's car, and they followed the blue car. The driver of the blue car obeyed all traffic signals and drove at a normal rate of speed. The car stopped at a stop sign, and the passenger jumped out and ran eastbound on 20th Street. As the driver of the blue car proceeded to pull away, the officers stopped it. Appellant, the driver, was handcuffed and detained at the scene. He was later transported to the police station for questioning.

Sergeant Joel Cook, who was proceeding to assist the officers, saw a young Black man run towards him. The man matched the description of the suspects, and Cook could see that the car that was being stopped around the corner matched the broadcast description. Cook gave chase and noticed the man was wearing a black T-shirt and black pants. Cook yelled several times at the man to stop and put up his hands. The suspect looked back at Cook several times and began to fumble in the waistband of his pants. Cook assumed he was trying to get out a gun. Cook fired at the suspect and missed, and his gun malfunctioned as he tried to fire again. He continued to chase the suspect while trying to fire, and when unsuccessful, he took cover. Cook had heard the sound of metal hitting the sidewalk, and he walked back and found a Desert Eagle .44-caliber Magnum on the ground, an unusually large gun. Some .44-caliber casings were later recovered at

1615 Rose Avenue. Cook subsequently identified the fleeing suspect from a "six-pack" as someone named Vaughn. Vaughn's fingerprint was found on the buckle of the front passenger seat belt in appellant's Oldsmobile Cutlass.

Detective Mark McGuire read appellant his *Miranda* rights,[4] and he and a Detective Erickson interviewed appellant as he sat in the back of the police car. Appellant said he had been at a Jack-in-the-Box restaurant when a young Black man asked him for a ride. Appellant described the route along which he drove the man, and he said that the man jumped out at 20th Street.

At the station, McGuire once again read appellant his rights. They interviewed appellant for approximately two hours and, with appellant's consent, tape recorded the final statement, which was approximately 15 minutes long. The tape was played for the jury. Appellant said he ate in the parking lot of Jack-in-the-Box after using the drive-through window. When he was finished eating, a man asked him for a ride. Appellant said he had seen the man only one time before. The man eventually ran from the car after saying, "'I am fixing to get up out of here. I am gone.'" In the unrecorded portion of the interview appellant changed his story several times. He said at various times that he was driving the man to King's Park, to a party, and to a store.

In an interview conducted on the following day, McGuire and a Detective Conant spoke with appellant for approximately one hour before again taping a statement. They interviewed him again later that afternoon. On this day, appellant said the restaurant drive-through window was closed, and then again said it was open. He described the route he took as going in the opposite way from what he had said before. The routes appellant described were either geographically impossible to take or else made no sense because the places he described were not where he said they were. Appellant said that when they passed a blue apartment building, his passenger said, "'Damn, the donkeys are thick.'" By donkeys, he meant Mexicans. In this interview, appellant said the passenger said nothing before he got out of the car and ran. Appellant claimed he did not hear any

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4 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

gunshots that evening, and in one of the interviews he said he heard or read about an incident on Rose Avenue on the computer in the police car. He never said he saw something that happened at 1615 Rose Avenue or that he had driven by there. At one point during appellant's second interview he said "he wanted to continue on with his mission," and he then corrected himself.

McGuire said the interviews were not taped entirely because appellant was telling so many stories. McGuire took notes of the unrecorded portions, but the notes were destroyed after a report was written.

On cross-examination, McGuire acknowledged that appellant told him he could help them find the shooter if he were allowed to make some telephone calls. Appellant said he did not know the shooter's name and did not know there was a gun in the car. After making those telephone calls, appellant gave the police the moniker "Junay." McGuire had already known who the shooter was -- a man named Wallace Vaughn. He made a six-pack and appellant picked out Vaughn's picture. McGuire acknowledged that a gang member who "snitches" on another gang member would probably be killed. Vaughn was a member of the Young Foundation Crips, a subset of the Insane Crips gang.

Appellant told McGuire that his gang moniker was "Tiny No Good." The letters "I.C.G." that appellant had tattooed on his three knuckles indicate he is an Insane Crips gang member. From May of 2000 until August of 2001 the Insane Crips were at war with the largest Hispanic gang in Long Beach, the East Side Longos. A member of the Insane Crips told McGuire that the term "mission" meant going out to shoot Mexicans or, generally, to "put in work" for the gang.

McGuire identified two T-shirts that were taken from appellant's car on the night he was arrested. The front of one T-shirt said "East Side Long Beach" and "Raiders" and "Where the turf meets the surf." McGuire said that it meant the African-American gangs in Long Beach have come together as one and call themselves "The East Side." The back of the shirt read, "'My locs and my dogs may be gone, but they are damn sure not forgotten,'" and it listed 30 to 50 monikers of gang members who were dead or incarcerated. McGuire explained that "locs" and "dogs" were terms of endearment used

by gang members and nongang members. McGuire testified that the Insane Crips hang out at King's Park, and it would not be unusual for them to go from the park to perform a mission.

When given a hypothetical describing the facts of this case, McGuire was of the opinion that the two African-American men were driving through the neighborhood looking for victims to shoot and not on their way from Jack-in-the Box to King's Park. He based this on interviews he had had with gang members, including appellant, who had described the gang meetings where the missions are assigned to two or more individuals who go out to complete the mission. The route the blue car took was not the most direct route from Jack-in-the-Box to King's Park.

Hector Cardiel of the gang enforcement section of the Long Beach Police Department testified at appellant's trial that he had had contact with appellant in January 2001 and had filled out a field-identification card on him. Appellant told Cardiel he was an Insane Crips gang member.

Appellant did not testify or present any evidence.

DISCUSSION

I. Exclusion of Shooter's Statement to Police

Appellant argues that the trial court abused its discretion and violated appellant's Sixth Amendment right to put on a defense. Unlike the trial court in appellant's first trial, which ended in a hung jury,[5] the trial court here excluded the statement of Wallace Vaughn, the actual shooter. According to appellant, this statement[6] exonerated appellant.

A. The Statement

The transcript reveals that Vaughn stated he was at a block party on the night of the shooting. He met up with an old friend, appellant, whose name he did not remember on the night of the shooting. Vaughn went with appellant to get a beer in appellant's blue

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[5] The record shows that the first jury deadlocked 10 to two in favor of guilt.

[6] Appellant appended the transcript of the statement in question to his opening brief. The transcript was marked as court's exhibit 1 in the instant trial.

car. Vaughn was carrying the gun in his waistband. The two men were on their way back to the party when Vaughn saw a Hispanic man with a bumblebee tattoo on his neck. He knew this man had shot his cousin. Once Vaughn saw this man, he told the driver to stop. He said the driver "didn't know what was going on." Vaughn jumped out of the car and shot twice at the guy with the bumblebee. Vaughn ran after the man and saw the party lights and a lot of people. He had not expected that to happen, and he turned around because he did not want anybody innocent to be wounded. He ran back to the car, and he and appellant drove off. When they got to 20th Street and Martin Luther King Boulevard, Vaughn jumped out of the car. As he ran, the gun began to slide down his pants, so he shook it out and kept running.

When a detective asked Vaughn if he had any conversation with anybody before the shooting started, Vaughn said "No." The detective asked, "You didn't say anything to anybody?" Vaughn replied, "No. About shooting nobody, no."

When asked if he was trying to kill the guy, appellant replied, "I (unintelligible) him, I wanted to paralyze him, like he paralyzed a close friend of mine." When asked if he was specifically looking for the man that night, Vaughn replied, "No. It just happened." Vaughn denied being a gang member.

Vaughn said he felt bad that innocent people were shot. When asked if anyone else was shooting besides him, Vaughn replied, ". . . It looked like another Hispanic male was shooting, but I probably can't say, you know, can't point the finger because I'm not sure." When asked if the driver took Vaughn over to Rose Avenue for the purpose of shooting that man, Vaughn said, "No. He didn't know what was going on, he was just driving, I guess he thought he was taking a safe way back to the block party or something, I don't know." Vaughn said he did not see the people get shot.

B. Proceedings Below

In a pretrial proceeding, defense counsel explained to the court that Wallace Vaughn took the Fifth Amendment in the prior trial and was declared unavailable. Counsel wanted to again play the tape of Vaughn's interview and have the transcript presented to the jury. The court acknowledged it had not yet read the transcript, but

invited argument on the issue. The prosecutor opposed introduction of the statement, arguing that the whole statement could not come in under an admission against penal interest[7] because it was not entirely of that nature, some portions of it were hearsay, and the statement was ambiguous, misleading, and untrustworthy. Defense counsel argued that the statement should come in under various exceptions, such as a declaration against penal interest and confession. After extensive argument, the trial court stated, "I will read the entire transcript, but my ruling at this point is I will allow the statement to come in." Subsequently, defense counsel told the jury in his opening statement that it would hear from the shooter, who told police he did the shooting, the gun was covered up by his shirt, and the driver did not know what was going on.

During a midtrial evidentiary hearing, the prosecutor asked the court to reconsider admission of Vaughn's statement, saying he would otherwise move to have Vaughn's prior convictions admitted into evidence. Before hearing argument, the court established that the parties agreed Vaughn was unavailable, meeting the first criterion of Evidence Code section 1230. The issues were therefore limited to whether the statement was against Vaughn's penal interest and whether it was reliable.

The trial court ascertained exactly which parts of the statement defense counsel wanted to have admitted and heard argument. The court commented, "The portions that you want to be admitted, specifically on page 7. Wallace: 'Once I saw him, I told the driver to stop. He didn't know what was going on. I jumped out the car. I opened fire at the guy with the Bubble Bee. [sic]' [¶] Then on page 14. Wallace: 'No he didn't know

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[7] An admission against penal interest is allowed pursuant to Evidence Code section 1230, which provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

what was going on, he was just driving. I guess he thought he was taking a safe way back to the block party or something. I don't know.' [¶] First of all, as to page 14, that clearly is not a statement against penal interest. Basically, is a statement that favors your client. But I don't see how you could interpret that to be a statement against penal interest. If you do, please let me know."

Counsel replied that the totality of the statement was an admission and was therefore reliable, and it was also a declaration against interest. The court replied that the only appropriate section under which it could be admitted was Evidence Code section 1230. The court went on to explain, "In *People versus Leach*, 15 Cal.3d 14, and *Williamson versus United States*, 512 U.S. at page 603, in both cases, basically, the court viewed with caution a situation in which a co-defendant, a co-defendant makes a statement against another defendant that either helps or hurts that person's case, in that it is viewed with caution because it is easy to either shift blame or curry favor. Basically, the court has to view the entire transcript of Mr. Vaughn, see whether or not his statement on July 25th, 2001, is, in fact, reliable. [¶] The other problem that I have with this particular transcript is, upon reading the entire transcript, and I must admit that I read the entire transcript at lunch today rather than when I made a ruling last time, is that he indicates, Mr. Vaughn indicates that he and your client both were at a party. And that they were going to a place to pick up some beer. But from listening to the testimony thus far, it is completely inconsistent with what statement that was provided by your client, in that he had met the shooter, Mr. Vaughn, alleged shooter, Mr. Vaughn, at Jack in the Box. [¶] I take this ruling very seriously. I don't like to change my decisions unless I think it is absolutely necessary. I also understand that this ruling, if it basically convicts your client, is a ground for appeal. So I take it very seriously. But based on the foregoing arguments that I listened to from both of you, and from the case law that I cited, from reviewing Mr. Vaughn, I have decided and reversed myself. I will not allow Mr. Vaughn's transcript to come in."

Defense counsel offered to limit the portions of the transcript still further and moved for a mistrial based on the fact that he told the jury during his opening statement

that they would hear from Vaughn. After hearing argument from the prosecutor, the court stated, "I will not allow the entire transcript and also page 7 to be included. And I will deny your motion for mistrial. . . . [¶] And as far as your concern that maybe the court is considering as a part of testimony whether or not Mr. Vaughn's transcript is reliable by relying on some of the testimony that has been received, that was just an example of a situation where the court found it to be unreliable. But I stated specifically statements that Mr. Vaughn made, similar to statements that was contributed in the *Duarte*[8] matter, in which the *Duarte* court basically said that the trial court made an error in allowing that particular statement to come in, pursuant to 1230. So, basically, that would be my ruling."

C. No Abuse of Discretion or Denial of Appellant's Right to Present a Defense

Evidence Code section 1230 provides an exception to the hearsay rule if the declarant is unavailable, the declaration was against the declarant's penal interest, and the declaration was sufficiently reliable to warrant admission. (*People v. Lawley* (2002) 27 Cal.4th 102, 153 (*Lawley*); *Duarte*, *supra*, 24 Cal.4th at pp. 610-611.) The trial court's ruling on the admissibility of such statements is reviewed broadly under the abuse of discretion standard. (*Duarte*, *supra*, at p. 615; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.)

A review of the record fails to establish any abuse of discretion, since testimony that Vaughn said appellant was not aware of Vaughn's intentions is not a statement against Vaughn's interest. It was therefore properly excluded hearsay. The instant case presents the kind of hybrid statement the court analyzed in *Lawley*. In that case, the defendant, charged with murder, sought to admit testimony that the declarant had stated he had killed someone, that the killing was at the direction of the Aryan Brotherhood, and that an innocent person was in jail for the crime. (*Lawley*, *supra*, 27 Cal.4th at pp. 151-152.) The trial court ruled that the statements that the declarant had killed a man and that

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8 *People v. Duarte* (2000) 24 Cal.4th 603 (*Duarte*).

someone had hired him to do so were admissible as declarations against penal interest. (*Id*. at p. 152.) The statement that the Aryan Brotherhood had directed him to kill the victim was not admissible, since the identity of the directing entity was not against his penal interest. The statement that an innocent man was in jail was inadmissible as a conclusion and opinion of the declarant. (*Ibid*.)

The California Supreme Court held the trial court did not abuse its discretion in excluding those portions of the statement. (*Lawley*, *supra*, 27 Cal.4th at p. 154.) Specifically, the court agreed that the statement that an innocent man was in jail for the crime was inadmissible as an opinion and conclusion, adding that, to the extent that the statement was an assertion of fact, it was hearsay that did not fall within the penal interest exception. (*Ibid*.) The court reasoned: "A court may not, applying this hearsay exception, find a declarant's statement sufficiently reliable for admission '"*solely because* it incorporates an admission of criminal culpability.'" [Citations.] As the high court reasoned in interpreting the analogous exception to the federal hearsay rule, '[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory nature. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.' (*Williamson v. United States* (1994) 512 U.S. 594, 599-560 . . . Whether a statement is self-inculpatory or not can only be determined by viewing the statement in context. [Citation.] [¶] In view of these concerns, this court 'long ago determined that "the hearsay exception should not apply to collateral assertions within declarations against penal interest." [Citation.] . . . [W]e have declared [Evidence Code] section 1230's exception to the hearsay rule "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant."' [Citation.]" (*Lawley*, *supra*, at p. 153, citing *Duarte*, *supra*, 24 Cal.4th at p. 612.)

The same reasoning leads to the conclusion that the trial court ruled appropriately in the instant case. Vaughn's statements that appellant did not know what was going on and that he was "just driving" were not against Vaughn's penal interest. They were

correctly excluded even though they formed part of the overall statement in which Vaughn made self-incriminatory remarks.

Furthermore, Vaughn's statement lacked trustworthiness. "To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) "[T]he issue of trustworthiness . . . is an individualized inquiry intimately related to the facts of each case." (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 334.)

The California Supreme Court has recognized that the trustworthiness of such declarations is limited and therefore the hearsay exception should not apply to collateral assertions within declarations against penal interest. (*People v. Leach* (1975) 15 Cal.3d 419, 439 (*Leach*).) Section 1230 does not apply to "'evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.'" (*Duarte*, *supra*, 24 Cal.4th at p. 612, quoting *Leach*, *supra*, 15 Cal.3d at p. 441.) "Under the rule of Leach, a hearsay statement 'which is in part inculpatory and in part exculpatory . . . does not meet the test of trustworthiness and is thus inadmissible.' [Citations.]" (*Duarte, supra,* at p. 612.)

The trial court found the instant case very similar to *Duarte* on the issue of trustworthiness. In *Duarte*, the California Supreme Court found it was error to admit the postarrest statements of the defendant's co-perpetrator, Morris—statements that implicated the defendant. (*Duarte*, *supra*, 24 Cal.4th at p. 618.) At trial, Morris invoked his Fifth Amendment right not to incriminate himself, and a police officer was allowed to testify about Morris's postarrest statements. (*Id*. at p. 610.) The police officer testified that Morris said he committed the drive-by shooting for which defendant was charged. The court found, however, that even a redacted version of what Morris told the officer retained a number of statements that were far from "specifically disserving" of Morris's penal interests, but rather served those interests. (*Id*. at p. 612.) Morris admitted the shooting but said he had shot at the wrong house and that he did the shooting in

retaliation for a prior shooting. He said he had seen on television that a lady had been shot in the leg, and that was when he knew it was the wrong house. He said he did not want to kill anyone or risk hurting anyone, so he shot high, towards the roof. (*Id*. at pp. 612-613.) The court stated that Morris's statements tended to cast a more sympathetic light on his motives and intentions. The court concluded that Morris's statements were not "'specifically disserving'" of his penal interests and were not trustworthy. (*Id*. at p. 618.)

With respect to trustworthiness specifically, the court stated that redaction cannot enhance the underlying reliability of the declarant's entire statement. (*Duarte*, *supra*, 24 Cal.4th 614.) An examination of Morris's unredacted statement revealed that it contained attempts to "'shift blame'" or "'curry favor'" despite being generally self-incriminating. (*Id*. at pp. 614-615.) The court stated that Morris's self-incriminating statements all alluded to circumstances that he apparently thought might be considered mitigating. (*Id*. at pp. 615-616.) The court cited *Leach* for the proposition that collateral statements are not made more trustworthy by proximity to incriminating statements. (*Id*. at p. 617.)

The court also found that the fact that the statements were made to the police after Morris was in custody reduced their trustworthiness because the statements were made in the "'coercive atmosphere of official interrogation.'" (*Duarte*, *supra*, 24 Cal.4th at p. 617.) The court stated that information received from those who are the focus of pending criminal charges is inherently suspect. (*Ibid*.)

These same criteria support the trial court's ruling that Vaughn's statements were untrustworthy. His statements were also made in the coercive atmosphere of the police station after he was arrested for the crime. Moreover, Vaughn's statement contained several portions that were apparently designed to mitigate his culpability. He claimed the shooting was a spur-of-the-moment decision caused by seeing the person with the tattoo. He said the shooting was in retaliation for the shooting of his cousin (although he later said it was the shooting of a friend). He claimed he fired only twice and only at the tattooed man. He said that he turned back as soon as he saw the people because he did not want innocent people to be wounded. He said he did not want to kill the man he was

after but only wanted to paralyze him, just as this man had paralyzed a friend of his. He said he felt bad about innocent people being shot and claimed he did not see anyone get shot. He also said that a Hispanic male might have been shooting during the incident as well. Given these circumstances surrounding Vaughn's statement, we conclude the trial court in this case did not abuse its discretion in finding it to be untrustworthy.

Appellant implies that California case law deals insufficiently with cases where the defendant, rather than the prosecution, seeks admission of evidence under Evidence Code section 1230 and cites *U.S. v. Paguio* (9th Cir. 1997) 114 F.3d 928 as an example of such a case. We note that *Lawley*, which cited *Duarte* extensively, was a case in which the defendant sought admission of the hearsay statement under Evidence Code section 1230, and we do not believe it necessary to discuss the Ninth Circuit case.

Lastly, appellant cites *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 (*Chambers*) for the proposition that one of the most fundamental rights possessed by an accused is the right to present witnesses in his own defense. Appellant contends this right was not respected in his case when the jury was not permitted to hear portions of Wallace Vaughn's statement that were "plainly admissible as a declaration against penal interest." He argues that, given the minimal amount of circumstantial evidence that was presented, it is quite likely that a different result would have ensued had the jury heard Vaughn's statement. He claims this fact was underscored by the first jury's deadlock.

We first observe that appellant made no claim specifically based on a violation of the Sixth Amendment before the trial court. Therefore, his federal claim is waived. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) In any event, we find this claim without merit.

The defendant in *Chambers* sought to introduce evidence that a third party, a man named McDonald, had confessed to the murder of which the defendant was accused. (*Chambers*, *supra*, 410 U.S. at p. 291.) The defense called McDonald as a witness, but he repudiated his earlier confession. (*Ibid*.) The United States Supreme Court held that the combination of a Mississippi statute precluding the impeachment of a party's own witness and Mississippi's limitation on declarations against penal interest effectively

foreclosed the defendant's ability to present potentially exculpatory evidence, thus denying him a fair trial. (*Id*. at pp. 291-293, 298, 302.)

As the court stated in *Lawley*, however, *Chambers* "made clear that in reaching its judgment it established no new principles of constitutional law, nor did its holding '"signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures."' [Citation.] The general rule remains that '"the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice."' [Citations.]" (*Lawley*, *supra*, 27 Cal.4th at pp. 154-155.) Having concluded that the trial court did not abuse its discretion under the ordinary rules of evidence, we also conclude there was no federal constitutional violation. Unlike *Chambers*, the circumstances surrounding the statement in the instant case show that it was properly excluded, and appellant was not denied a fair trial.

II. Mistrial Motion

A. Appellant's Argument

Appellant contends that the trial court's refusal to grant a mistrial after it changed its ruling on admission of Vaughn's statement caused defense counsel to appear to be a liar before the jury, rendered appellant's trial fundamentally unfair, and denied him the right to due process, requiring reversal. Appellant claims that the trial court's instruction to the jury to not regard what the attorneys say as evidence did not mitigate the damage, but rather, it aggravated the damage. It made it seem that attorneys are free to lie to the jurors in their in-court statements. Even if the trial court were correct in excluding Vaughn's statement, appellant contends, the court was obligated to grant a new trial rather than continuing a proceeding in which defense counsel was unfairly discredited.

B. Proceedings Below

The record shows that the court began the trial by reading the jury a set of instructions, including one that stated, "[s]tatements made by the attorneys during the

trial are not evidence." Immediately prior to opening statements, the court said, "Ladies and Gentlemen, this is now a chance for both attorneys to make what is called an opening statement. As I indicated before, what the attorneys have to say, they are not evidence. This is simply an opportunity for both attorneys, if they wish, to basically tell you what they hope the evidence will show in the next several days."

During his opening statement, defense counsel described to the jury appellant's arrest and his identification of Wallace Vaughn in the six-pack. He then told the jury, "In custody, [Wallace Vaughn] gives a statement to the police. You are going to hear what he told the police. Primarily what he told the police is that he did the shooting, Wallace Vaughn did the shooting, that he did have the gun in his waistband, that it was covered up by his shirt. And also that he said to the officers, 'Once I saw him this person who I, was going to shoot at, I told the driver to stop. He did not know what was going on. . . .' [¶] He didn't know what was going on. He was just driving. I guess he thought he was taking a different way back to the block party or something. [¶] This is the evidence. Mr. Miller is driving the car. Wallace Vaughn, the person he picked up. Mr. Miller is then arrested. He gives a statement. He assists the police in having Mr. Wallace Vaughn arrested. Wallace Vaughn and the defendant all say that Mr. Miller knew nothing about what was going on."

Following the court's final decision to exclude Vaughn's statement, defense counsel moved for a mistrial, stating, "We had a ruling. I made an opening statement to the jury. I told them they were going to hear from Mr. Vaughn. Now they are not. Puts me in a bad position."

In denying the mistrial motion, the court stated, "I would grant to you that I put you in a bad spot, but I have told the prospective jurors from the date of jury selection process to when they were picked, four days, I repeated a number of times that what the attorneys have to say are not evidence. In fact, before either party started their opening statement, I told the jurors that what the attorneys have to say are not evidence."

C. No Abuse of Discretion or Due Process Violation

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555; *People v. Silva* (2001) 25 Cal.4th 345, 372.) "It is not an abuse of discretion when a trial court denies a motion for mistrial after being satisfied that no injustice has resulted or will result from the occurrences of which complaint is made." (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 330.)

In the instant case, we conclude that the trial court reasonably found that the mention of Wallace Vaughn in counsel's opening statement did not irreparably damage appellant's chances of receiving a fair trial. First, the opening statement was made on the afternoon of August 7, 2002, and the jurors did not receive the case until the afternoon of August 12, 2002. Since no further mention was made of Vaughn's statement during trial, it is unlikely the lack of evidence regarding the statement had the impact appellant alleges. Secondly, prior to denying the mistrial motion, the trial court had the assurances of the prosecutor that he had no intention of calling attention to the lack of evidence about Vaughn's statement during the prosecutor's closing argument.

Appellant complains that the jury was not informed that it was the court's ruling rather than appellant's decision that prevented them from hearing the promised evidence. We observe, however, that defense counsel did not respond to the prosecutor's statement that he would not object to some type of curative instruction, which implies that defense counsel desired none. Additionally, as noted, the trial court instructed the jury several times -- at both the beginning and the end of trial -- not to regard what the attorneys said as evidence, and we presume the jury followed the court's instructions. (*People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

We conclude that, under these circumstances, the trial court did not abuse its discretion. For the same reasons, we reject appellant's claim that denial of the mistrial motion resulted in a trial that was fundamentally unfair and violated his right to due process.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

NOTT